

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

VERIFONE, INC., a Delaware corporation,)
)
Plaintiff,)
vs.)
)
A CAB, LLC, a Nevada limited liability)
company,)
)
Defendant.)

Case No.: 2:15-cv-00157-GMN-GWF

ORDER

A CAB, LLC, a Nevada limited liability)
company,)
)
Counterclaim Plaintiff,)
vs.)
)
VERIFONE, INC., a Delaware corporation,)
)
Counterclaim Defendant.)

Pending before the Court is a Motion to Dismiss Defendant A Cab, LLC's ("A Cab") Second Amended Counterclaim (ECF No. 35) filed by Plaintiff VeriFone, Inc. ("VeriFone"). A Cab filed a Response (ECF No. 37), and VeriFone filed a Reply (ECF No. 38).

I. BACKGROUND

A Cab alleges in its Second Amended Counterclaim ("SAC") that it entered into the Verifone Transportation Services Agreement (the "Services Agreement") with VeriFone and Taxipass on December 18, 2007, wherein Taxipass agreed to install POS Terminals in A Cab's participating taxis, such participating taxis had access to the VeriFone Hosted Software through Taxipass' equipment, and A Cab granted Taxipass the exclusive right to process all electronic

1 payment transactions for its participating taxis. (SAC ¶¶ 5–8, ECF No. 30; Services Agreement,
 2 Ex. A to Mot. to Dismiss SAC §§ 1–2, ECF No. 35-1). A Cab further alleges that Taxipass
 3 defaulted on its obligations to A Cab under the Services Agreement, VeriFone notified A Cab
 4 of Taxipass’ default, and VeriFone assumed the operations and obligation of Taxipass. (SAC ¶¶
 5 12–14). Upon assuming Taxipass’ operations and obligation under the Services Agreement, A
 6 Cab alleges that VeriFone “failed to cure the swipe revenue which was owed to A Cab,” which
 7 was approximately \$117,000. (*Id.* ¶ 15).

8 A Cab further alleges that it entered into a Dispatch Service Lease Agreement (the
 9 “Dispatch Agreement”) with VeriFone on November 11, 2011, wherein VeriFone agreed to
 10 provide A Cab with a dispatch system. (*Id.* ¶¶ 11, 31). A Cab claims that “[p]ursuant to section
 11 6 of the Dispatch Agreement, following the expiration of the Service Agreement, the parties
 12 agreed to negotiate in good faith to enter into an agreement pertaining to payment processing
 13 service.” (*Id.* ¶ 16). Moreover, A Cab alleges that “Verifone breached this clause by instead
 14 merely continuing the swipe revenue from the Service Agreement at \$1 per swipe, rather than
 15 the industry standard of \$2 per swipe.” (*Id.* ¶ 17).

16 On October 23, 2015, the Court granted VeriFone’s Motion to Dismiss A Cab’s
 17 Amended Counterclaim, dismissing A Cab’s Amended Counterclaim with prejudice. (Order
 18 6:11–14, ECF No. 29). The Court held that the Dispatch Agreement barred A Cab from
 19 seeking consequential damages from VeriFone. (*Id.* 5:15–17). Because A Cab did not seek any
 20 other relief for its claims, the Court dismissed its claims against VeriFone with leave to amend.
 21 (*Id.* 5:17–21).

22 **II. LEGAL STANDARD**

23 Dismissal is appropriate under Rule 12(b)(6) where a pleader fails to state a claim upon
 24 which relief can be granted. Fed. R. Civ. P. 12(b)(6); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,
 25 555 (2007). A pleading must give fair notice of a legally cognizable claim and the grounds on
 which it rests, and although a court must take all factual allegations as true, legal conclusions

1 couched as a factual allegations are insufficient. *Twombly*, 550 U.S. at 555. Accordingly, Rule
 2 12(b)(6) requires “more than labels and conclusions, and a formulaic recitation of the elements
 3 of a cause of action will not do.” *Id.* “To survive a motion to dismiss, a complaint must contain
 4 sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its
 5 face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). “A
 6 claim has facial plausibility when the plaintiff pleads factual content that allows the court to
 7 draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* This
 8 standard “asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.*

9 If the court grants a motion to dismiss for failure to state a claim, leave to amend should
 10 be granted unless it is clear that the deficiencies of the complaint cannot be cured by
 11 amendment. *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992). Pursuant
 12 to Rule 15(a), the court should “freely” give leave to amend “when justice so requires,” and in
 13 the absence of a reason such as “undue delay, bad faith or dilatory motive on the part of the
 14 movant, repeated failure to cure deficiencies by amendments previously allowed, undue
 15 prejudice to the opposing party by virtue of allowance of the amendment, futility of the
 16 amendment, etc.” *Foman v. Davis*, 371 U.S. 178, 182 (1962).

17 **III. DISCUSSION**

18 **A. Motion to Dismiss**

19 **1. Services Agreement**

20 A Cab alleges that VeriFone breached the Services Agreement by failing to pay monies
 21 owed to A Cab as a result of VeriFone’s assumption of Taxipass’ obligation under the Services
 22 Agreement. (SAC ¶ 24). However, the Services Agreement contains the following forum
 23 selection clause:

24 Any legal suit, action or proceeding arising out of or relating to this
 25 Agreement shall be commenced in a federal court in the Northern
 District of California or in state court in Santa Clara County,
 California, and each party hereto irrevocably submits to the

jurisdiction and venue of any such court in any such suit, action or proceeding.

(Services Agreement § 14).

VeriFone moves to dismiss A Cab's claims related to the Services Agreement because they "are improper in this Court . . . [and] can be litigated in only California." (Mot. Dismiss 7:9–14). Rather than rely upon 28 U.S.C. § 1404(a) or Rule 12(b)(3) of the Federal Rules of Civil Procedure, VeriFone bases its motion on Rule 12(b)(6). (*Id.* 1:22–23). The Supreme Court has not foreclosed this avenue. *Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 134 S. Ct. 568, 580 (2013). It appears no controlling precedent precludes 12(b)(6) dismissal based on a contrary forum selection clause. *See JPMorgan Chase Bank, N.A. v. Trade Show Fabrications W., Inc.*, No. 2:12–CV–00554–GMN, 2014 WL 347476, at *2–3 (D. Nev. Jan. 29, 2014) (finding no controlling precedent and declining to resolve the question). District courts after *Atlantic Marine* have split as to whether Rule 12(b)(6) is an appropriate vehicle. *See, e.g., Hudson Fin. Corp. v. Autoliv ASP, Inc.*, No. 1:12CV2808, 2014 WL 132437, at *2 n.1 (N.D. Ohio Jan. 14, 2014) (noting a split in authority but holding that § 1404(a) is the only appropriate vehicle for enforcement of a forum selection clause); *Carter's of New Bedford, Inc. v. Nike, Inc.*, No. CIV.A. 13–11513–DPW, 2014 WL 1311750, at *2 n.5 (D. Mass. Mar. 31, 2014) (citing First Circuit precedent allowing dismissal under Rule 12(b)(6) based on a contrary forum selection clause and considering such a motion). The Court accepts VeriFone's characterization of its motion as brought under Rule 12(b)(6).

Opposing the validity of the Services Agreement's forum selection clause, A Cab argues that the Services Agreement was modified in 2009. (Response 2:25–27). A Cab asserts that the 2009 modification of the Services Agreement does not have a forum selection clause limiting any action based upon the Services Agreement in California. (*Id.* 2:27–28). A Cab attaches the 2009 modification to its Response. (*See* Ex. A to Response, ECF No. 37-2). However, nowhere

1 in A Cab's SAC does A Cab plead facts on which the Court could infer that the Services
 2 Agreement was modified in 2009. Rather, the allegations in the SAC merely relate to the
 3 Services Agreement that was entered into by the parties on December 18, 2007. (SAC ¶ 5).
 4 "Generally, a district court may not consider any material beyond the pleadings in ruling on a
 5 Rule 12(b)(6) motion." *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555
 6 n.19 (9th Cir. 1990). Thus, the Court will not consider the 2009 modification as it goes beyond
 7 the pleadings and is inappropriate in a response to a Rule 12(b)(6) motion. Accordingly, the
 8 Court dismisses A Cab's counterclaims based upon the Services Agreement and will give A
 9 Cab leave to amend its SAC to include facts related to the 2009 modification of the Services
 10 Agreement.

11 **2. Dispatch Agreement**

12 A Cab alleges that VeriFone breached Section 6 of the Dispatch Agreement. (SAC ¶¶
 13 24–28). A claim for breach of contract must allege (1) the existence of a valid contract; (2) that
 14 the plaintiff performed or was excused from performance; (3) that the defendant breached the
 15 terms of the contract; and (4) that the plaintiff was damaged as a result of the breach. *See*
 16 Restatement (Second) of Contracts § 203 (2007); *Calloway v. City of Reno*, 993 P.2d 1259,
 17 1263 (Nev. 2000) ("A breach of contract may be said to be a material failure of performance of
 18 a duty arising under or imposed by agreement").

19 Section 6 of the Dispatch Agreement provides that "VeriFone and [A Cab] shall
 20 negotiate in good faith to enter into an agreement covering the subject matter thereof. So long
 21 as it is allowed under applicable law, such agreement will incorporate a payment voucher
 22 model pursuant to which VeriFone will pay to [A Cab] at least \$1 per transaction fee as long as
 23 voucher fee is at least \$3." (ECF No. 17). Specifically, A Cab alleges that "VeriFone failed to
 24 comply with Section 6 requiring negotiation of an agreement upon the expiration of the Service
 25 Agreement, and instead has to date paid A Cab \$1 per swipe rather than the \$2 per swipe

1 industry standard,” which has resulted in “the loss of swipe revenue which continues to be
2 incurred.” (SAC ¶¶ 26–27). Accordingly, the Court finds that A Cab has sufficiently pled a
3 breach of contract counterclaim based on the Dispatch Agreement.

4 Furthermore, A Cab alleges that VeriFone breached the implied covenant of good faith
5 and fair dealing. (SAC ¶¶ 33–34). Under Nevada law, “[e]very contract imposes upon each
6 party a duty of good faith and fair dealing in its performance and execution.” *A.C. Shaw*
7 *Constr. v. Washoe County*, 784 P.2d 9, 9 (Nev. 1989) (quoting Restatement (Second) of
8 Contracts § 205). To establish a claim for breach of the implied covenant of good faith and fair
9 dealing, a plaintiff must show that: (1) the plaintiff and defendant were parties to a contract; (2)
10 the defendant owed a duty of good faith and fair dealing to the plaintiff; (3) the defendant
11 breached his duty by performing in a manner unfaithful to the purpose of the contract; and (4)
12 the plaintiff’s justified expectations were denied. *Crow v. Home Loan Ctr.*, No. 3:11-cv–
13 00259–LRH–VPC, 2011 WL 2214118, at * 2 (D. Nev. 2011).

14 Specifically, A Cab alleges that “VeriFone breached its implied duty by failing to install
15 a dispatch system that performed as promised,” which “A Cab has been damaged in an amount
16 of at least \$117,000, the monies owed pursuant to VeriFone’s assumption of Taxipass’
17 obligations” and “A Cab has been damaged by the loss of swipe revenue which continues to be
18 incurred.” (SAC ¶¶ 33–34). Accordingly, the Court finds that A Cab sufficiently pleads a
19 breach of the implied covenant of good faith and fair dealing counterclaim based on the
20 Dispatch Agreement.

21 **B. Leave to Amend**

22 Rule 15(a)(2) of the Federal Rules of Civil Procedure permits courts to “freely give
23 leave [to amend] when justice so requires.” Fed. R. Civ. P. 15(a)(2). The Ninth Circuit “ha[s]
24 held that in dismissing for failure to state a claim under Rule 12(b)(6), ‘a district court should
25 grant leave to amend even if no request to amend the pleading was made, unless it determines

1 that the pleading could not possibly be cured by the allegation of other facts.’’ *Lopez v. Smith*,
2 203 F.3d 1122, 1127 (9th Cir. 2000) (quoting *Doe v. United States*, 58 F.3d 494, 497 (9th Cir.
3 1995)).


4 The Court finds that A Cab may be able to plead additional facts to support its
5 counterclaims against VeriFone based on the Services Agreement. Accordingly, because the
6 Court finds that A Cab may be able to plead additional facts to support its dismissed
7 counterclaims, the Court will grant A Cab leave to file a third amended counterclaim solely for
8 this purpose. Plaintiffs shall file a third amended counterclaim within **fourteen (14) days** of
9 the date of this Order if it can allege sufficient facts that plausibly establishes its dismissed
10 counterclaims based on the Services Agreement.

11 **IV. CONCLUSION**

12 **IT IS HEREBY ORDERED** that VeriFone’s Motion to Dismiss (ECF No. 35) is
13 **GRANTED in part** and **DENIED in part**. Accordingly, A Cab’s counterclaims based on the
14 Services Agreement are dismissed without prejudice.

15 **IT IS FURTHER ORDERED** that A Cab shall file its third amended counterclaim
16 within **fourteen (14) days** of the date of this Order. Failure to file a third amended
17 counterclaim by this date shall result in the Court dismissing A Cab’s counterclaims based on
18 the Services Agreement with prejudice.

19 **DATED** this 24 day of August, 2016.

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Gloria M. Navarro, Chief Judge
United States District Judge